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IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 31

NORTON I. KRETZKE,

Petitioner,

vs.

UNITED STATES OF AMERICA.

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR REHEARING

EDWARD M. KEATING,
10 South La Salle Street,
Chicago, Illinois.

Counsel for Petitioner.

JOSEPH R. ROACH,
Of Counsel.

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Your petitioner, Norton I. Kretzke, presents this, his petition for rehearing, and respectfully submits to the court that, after a most careful study of the opinion of this honorable court, petitioner Kretzke is impelled to the conclusion that certain important and material matters in the record respecting the proceedings before the trial have been overlooked by the court, and that certain important and material facts at the trial have

been overlooked and misapprehended in the opinion, and that the application of the law to the case in certain important respects has not been correctly made in the opinion, and that vital and material propositions necessary to a correct decision were not considered in the opinion.

This petitioner will not burden the court with arguments with respect to all of his contentions made in his original brief, but without waiving his position with respect to those propositions not covered herein, he respectfully asks leave to discuss in this petition some of the matters with respect to which he believes brief discussion will persuade the court to grant a rehearing. Petitioner, therefore, respectfully petitions for a hearing of said cause and in support of said petition respectfully shows the following:

I.

THE COURT IN FORCING THE SERVICES OF ATTORNEY STEWART UPON KRETZKE OPERATED FAR MORE PREJUDICIALLY AGAINST KRETZKE THAN AGAINST GLASSER, AND THEREFORE THERE SHOULD BE A REVERSAL AS TO KRETZKE.

All reasons urged by the court for the reversal of the judgment against Glasser applies even with more force to the proposition that the judgment against Kretzke should be reversed. At the very outset of the trial Kretzke's lawyer, who had prepared this long and intricate case for trial, was unable to represent him and withdrew from it. Another attorney who had no knowledge of this case was appointed by the court to represent

him. The petitioner objected to the services of this attorney. The court asked Attorney Stewart who had prepared the case for Glasser to act as Kretzke's lawyer. Stewart stated that the defense, in his opinion, at certain points would clash. The court stated in answer to this suggestion of Stewart that it thought that the effect of Stewart's representing Kretzke would have a favorable effect upon the jury, operating in favor of Kretzke. Glasser suggested an objection to Stewart representing Kretzke. The court then forced the lawyer whom Kretzke rejected upon him, saying: "Mr. McDonnell, you will have to stay in this case until he gets (meaning Kretzke) another lawyer, if he isn't satisfied with you," and then ordered the selection of the trial jury. In the face of this dire emergency the petitioner accepted Stewart as his counsel and the trial proceeded. Upon these facts it cannot be maintained that petitioner waived his right to be represented by disinterested counsel. It is clear that he was coerced by the circumstances and the attitude of the court into taking Stewart. This seems to appear from the language of the court:

"No such concern on the part of the court for the basic rights of Glasser is disclosed by the record before us. The possibility of the inconsistent interests of Glasser and Kretzke was brought home to the court, when instead of jealously guarding Glasser's rights, the court may fairly be said to be responsible for creating a situation which resulted in the impairment of these rights. For the manner in which the parties accepted the appointment indicates that they thought they were acceding to the wishes of the court. Mr. Kretzke said this appointment could be accepted 'if your Honor wishes to appoint him (Stewart)' and Stewart immediately replied: 'As long as the court knows the situation. I think there is something in the fact that the jury knows that we cannot control that.' The court made no effort

to ascertain Glasser's attitude or wishes. Under these circumstances, to hold that Glasser really, albeit tacitly, acquiesced in the appointment of Stewart is to do violence to reality and to condone a dangerous laxity on the part of the trial court in the discharge of its duty to present the fundamental rights of the accused."

This reasoning applies with far greater force to Kretzke than to Glasser, for Glasser had a choice in the matter. Not so with Kretzke. He had either to accept Stewart or to go without representation, or take such as under the circumstances was tantamount to none at all.

Among the items listed by the court as depriving Glasser of the proper assistance of counsel was the failure of Stewart to cross-examine the witness, Brantman. Brantman testified primarily against Kretzke, not against Glasser. Kretzke was far more injured by the failure to cross-examine Brantman than was Glasser.

The court then proceeded to argue that while the violation of Glasser's constitutional rights in the above respect requires a reversal as to him, it does not require such as to the other defendants and cites authorities to sustain this view. However, they did not seem to be in point. *Agnello v. U. S.*, 269 U. S. 20 (cited in opinion as 296 U. S. 20) holds that the admission in a prosecution against several conspirators of evidence obtained by the unconstitutional search of the premises of one of them does not require the reversal of the conviction of others, where the court instructed the jury that the evidence was admissible against the one on whose premises it was found. The accused requested no instructions in reference to the matter. *U. S. v. Socony Vacuum Oil Co.*, 310 U. S. 150, holds that new trials may be granted to some defendants while denying them to others in the prosecution

under the Federal Anti Trust Act for combining to control prices, when the finding of the jury that the acts of the defendants affected prices was not necessarily dependent upon the participation of all the defendants. *Rossi v. United States*, 278 Fed. 349, holds that where an indictment charged a conspiracy between the defendant and others named and others unknown, the granting of a new trial to one of the accused's confederates did not entitle him to a new trial. The same holding is to be found in *Belfi v. U. S.*, 259 Fed. 822, and *Brown v. U. S.*, 145 Fed., both cited by the court in support of its position.

We do not believe these cases to be in point, but consider the subject controlled by a different line of authority such as *Logan v. U. S.*, 144 U. S. 363, and *Wheaton v. U. S.*, 113 Fed. 710 (C. C. A. 3rd).

In the first case the Supreme Court in stating and applying the doctrine here contended for, at page 309, 144 U. S., said:

"There being other evidence tending to prove the conspiracy, and any acts of Logan in pursuance of the conspiracy being therefore admissible against all the conspirators as their acts, the admission of incompetent evidence of the acts of Logan prejudiced all the defendants and entitles them to a new trial."

We submit that upon the reasoning of the court in regard to the admission of this evidence against Glasser and applying the same to the situation of Kretzke that error of such palpable and prejudicial character results as to cause the court to consider same under rule stated by this court in such cases as *Weborg v. U. S.*, 163 U. S. 632, 658; *Elgatt v. U. S.*, 197 U. S. 207, 221; *Crawford v. U. S.*, 212 U. S. 183, 194, and *Wcems v. U. S.*, 217 U. S. 349, 362, and reverse Kretzke's conviction.

II.

ADMISSION OF THE TESTIMONY OF ALEXANDER CAMPBELL WAS REVERSED ERROR AGAINST KRETZKE.

In the paragraph on page 15 of the opinion we find this disposition of what petitioner assigned and urged as prejudicial error:

"No reversible error was committed by overruling objections to the testimony of Alexander Campbell with relation to the dealings with Roth. Trial judges have a measure of discretion in allowing testimony which discloses the purpose, knowledge or design of a particular person. *Butler v. United States*, 53 F. (2d) 800; *Simpkins v. United States*, 78 F. (2d) 394, 598. We do not think the bounds of that discretion were exceeded here. The statements of Roth were not in furtherance of the conspiracy, but they did tend to connect Roth with it by explaining his state of mind."

This petitioner assigned the admission of this testimony against him as error in his petition for certiorari (Pet. 8) and discussed and argued it in his brief (Brief 11, 82), citing authorities in support of his contention. The Government in its brief never noticed the point. The petitioner devoted his entire reply brief to a further discussion of this point. He contended (1) that the testimony was not admissible as to him for any purpose; and (2) that if it was so admissible, the testimony was of such a vague and uncertain character as to destroy its admissibility. Many cases were cited seeking to sustain these respective contentions. We respectfully submit that the statement of the court in this opinion would render reversal under the first proposition imperative. The language of the opinion is "the statements of Roth were not

in furtherance of the conspiracy, but they did tend to connect Roth with it by explaining his state of mind." The petitioner specifically objected to the testimony as regards himself, but the court admitted it to operate against him. Roth's state of mind in regard to the widely separated transaction certainly could not have the slightest probative tendency to show that the petitioner was guilty of the conspiracy charged in the indictment. The evidence was highly prejudicial in its application against the petitioner. A reconsideration of the authorities cited by him on this point seems to give this proposition all necessary support.

III.

PREJUDICIAL ERROR WAS COMMITTED AGAINST KRETZKE THROUGH THE ADMISSION OF EXHIBITS 81A and 113 AGAINST GLASSER.

We believe the court to be in error in holding that the admission of Government's Exhibits 81A and 113 was not reversible error as to the petitioner. If they were not admissible against Glasser, their admission would be such prejudicial error against Glasser as to require a reversal as to Glasser, and such being the case such admission would likewise be a reversal error against Kretzke. *Logan v. U. S.*, 144 U. S. 363, and *Weadon v. U. S.*, 113 F. (2d) 710, *supra*. In support of this position we adopt and quote from Glasser's brief, pp. 38-42:

"A full appreciation of the effect they must have had on the jury cannot be obtained without examination of these reports. Therefore, these original exhibits have been forwarded and are now on file in the office of the Clerk of this Court.

Exhibit 81A is an elaborate report of 25 pages containing first a 'Chronological Narrative History'

appearing to state established facts. Following this under the heading 'Testimony of Witnesses', there are set out at length the statements purportedly made to the agent by each of a large number of witnesses concerning the accused persons.

Exhibit 113 is almost identical in format except that much of the 'Testimony of Witnesses' is enclosed in quotation marks, thus adding to the prejudicial effect upon the jury. Not to be forgotten is the fact that in each of these reports Kaplan, one of the defendant alleged co-conspirators with petitioner, is referred to as the apparent organizer of the illicit distillery project there involved.

The feeble argument of the government is (Br. in Opp. p. 30):

These reports were of course not offered for the purpose of proving the commission of the liquor violation therein described, but *to show what Glasser had before him* when he acted in these cases. (Italics supplied.)

This can mean any of three things:

(1) That the report was offered to show that a report as to law violation by these defendants had been made to Glasser. But this cannot stand since the fact had already been established by testimony of witnesses and by the evidence that Glasser had presented the cases to grand juries (R. 528-532).

(2) That, irrespective of the truth or falsity of the statements contained therein, such statements had been made. But if the correctness of these statements be not assumed by the jury, then Glasser equally was entitled to treat them as false, and if so, of course they failed to show that anything was before him and were no criteria by which to measure Glasser's conduct.

(3) That all statements contained in the report were substantially true and therefore to be treated as evidence available to Glasser, and upon the existence of which Glasser's failure to obtain more indictments was to be appraised. This, of course, was in fact the sole purpose for which they were offered

by the government, and the jury was plainly intended to accept them as evidence of the existence of the facts therein stated. Nor was their introduction inadvertent; it was deliberate and purposeful after much verbal maneuvering (R. 446-451), and the reports were submitted to the jury as exhibits to be taken to the jury room with calculated regard to their effect. The record shows that the complete text of Exhibit 81A, together with the statements given by the various witnesses in connection therewith, was read to the jury (R. 533). While Exhibit 113 was not read to the jury, they were told in specific terms where they could find the chronological narrative, the list of witnesses, and the 'available' evidence against each defendant involved in the operation of the still (R. 539-540). Indeed, the Government tacitly admits that these reports were submitted as proof of the facts stated therein, by relying on them and in citing to them as follows (Br. in Opp. pp. 6, 9):

Available evidence was not used by Glasser upon these presentations (R. * * * 602).

The record discloses many instances of Glasser's failure to utilize available information and evidence in securing indictments * * * (R. * * * 602, 609).

Thus the government by these record references to the report in the Spring Grove case asserts in this case that such reports were 'evidence.' This attempt to evade the hearsay rule under the appearance of an exception thereto, is a subterfuge probably as old as the rule itself. It is the same evasion which was recently met by the stern refusal of this Court to lend the slightest countenance to a sophism so plainly at war with preservation of the basic elements of fair trial. *Shepard v. United States*, 290 U. S. 96. There, with language peculiarly applicable to the attempted rationalization of the Circuit Court of Appeals that (R. 1132):

The information contained in the reports * * * threw light upon the question this Court said (p. 104):

This fact, if fact it was, the government was free to prove, but not by hearsay declarations. It will not do to say that the jury might accept the declaration for any light that they cast upon the existence of a vital urge, and reject them to the extent that they charged the death to someone else.

Applying the holding of the *Shepard* case here, it is plain that it will not do to say that the jury might accept the report and statements contained therein for any 'light' that they cast upon the question of whether reports of this law violation had been made to Glasser, and reject them to the extent that they tended to show the evidentiary facts of such violation. *United States v. Perlstein*, 120 F. (2d) 276, 282-283.

As this Court said in the *Shepard* case (p. 104):

Discrimination so subtle is a feat beyond the compass of ordinary minds. * * * It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed. They have their source very often in considerations of administrative convenience, of practical expediency, and not in rules of logic. When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out.

Furthermore, it is well established that in the presentation of evidence before a grand jury it is incumbent upon the prosecuting attorney to see that only competent evidence is introduced. *United States v. Farrington*, 5 Fed. 343, 347; *In re Grand Jury*, 62 Fed. 840, 846. As was said in *United States v. Kilpatrick*, 16 Fed. 765, 771:

The prosecuting officer is presumed to be familiar with the rules of evidence and it is his duty to take care that no evidence is received by the grand jury which would not be admissible in a court upon the trial of a cause. 1 Whart. Crim. Law, Sec. 493.

Therefore these statements of alleged facts contained in these reports were available as a measure

of Glasser's duty only if made by the witnesses themselves—not in mere reports. As said by Mr. Justice Field, in charging a grand jury in California (*Charge to Grand Jury*, 30 Fed. Cas. No. 18,255, at p. 993):

In your investigation you will receive only legal evidence to the exclusion of mere reports, suspicions and hearsay evidence.

All these principles are well established, and applicable here. Yet the government would deprive petitioner of his right of confrontation on the stated ground that the reports showed 'what Glasser had before him' (Gov. Br. in Opp., p. 30)."

This error could not be cured by any subsequent instructions to the jury.

Waldron v. Waldron, 156 U. S. 361, 39 L. Ed. 453.

Throckmorton v. Holt, 180 U. S. 552, 55 L. Ed. 663.

Holt v. U. S., 94 Fed. (2d) 90, 94 (C. C. A. 10).
C. M. Spring Drug Co. v. U. S., 12 Fed. (2d) 852.

CONCLUSION.

In conclusion we respectfully submit that by reason of the foregoing matters the petition for rehearing should be granted.

Respectfully submitted,

EDWARD M. KEATING,
Attorney for Petitioner.

JOSEPH R. ROACH,
Of Counsel.